Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-424

AUDREY JEFFERSON,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

AUDREY JEFFERSON,
Petitioner pro se.

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IN THE

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No.

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AUDREY JEFFERSON,
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v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

———

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner, Audrey Jefferson, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered on June 20, 1975.

OPINIONS BELOW.

The Memorandum Opinion of the Court of Common Pleas for Berks County, Pennsylvania is reported at 65 Berks Cty L.J. 96. A copy is also appended hereto at page A1.

The opinion of the Superior Court of Pennsylvania is unreported but a copy is appended at page A5.

The Order of the Supreme Court of Pennsylvania denying the appeal per curiam on June 20, 1975 is appended at page A7.

The opinion of the Court of Common Pleas for Berks County, Pennsylvania, in the companion case of *Com. v. Joan Piper* is reported at 63 Berks Cty L.J. p. 117 (Pa. C. P. 1971); and the opinion of the Superior Court of Pennsylvania in the *Piper* case is reported at 221 Pa. Super. 187, 289 A. 2d 193 (1972). The opinion is appended hereto at page A8. The opinion of the Supreme Court of Pennsylvania in the *Piper* case filed October 16, 1974 is reported at 458 Pa. 307 (Advanced Sheets) and is appended at page A17.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 20, 1975. As indicated *supra* a copy of the Order denying the appeal per curiam is appended at page A7. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED.

I. Do mere words of suggestion or proposition to commit sodomy establish the crime of solicitation to commit sodomy?

Not answered by the per curiam majority opinion.

II. Does the failure of the lower court to impose a minimum sentence, as well as a maximum sentence, under the New Muncy Act constitute a denial of equal protection of the law to women?

Not answered by the per curiam majority opinion.

III. Did the Pennsylvania Appellate Courts properly invoke the waiver rule with respect to errors in sentencing?

Not answered by the per curiam majority opinion.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

United States Constitution, Fourteenth Amendment:

". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Act of June 24, 1939, P. L. 872, Sec. 502, 18 P. S. Section 4502 (now superseded by Sections 902, 902a, 3123 and 3124 of the Act of December 6, 1972, P. L. 334 effective June 6, 1973):

"Whoever, unlawfully and maliciously, assaults another with intent to commit sodomy, or solicits, and incites another to permit and suffer such person to commit sodomy with him or her, is guilty of a felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand ($1000) dollars or undergo imprisonment, by separate and solitary confinement at labor, not exceeding five (5) years, or both."

Act of July 16, 1968 P. L. – No. 171, Sec. 1, 61 P. S., Sec. 566 (the New Muncy Act) pertinent parts: "Any court of record in this Commonwealth, exercising criminal jurisdiction, may, in its discretion, sentence to the State Industrial Home for Women any female over sixteen years of age, upon conviction for, or upon pleading guilty of, the commission of any criminal offense . . . The court in imposing sentence shall not fix a minimum sentence, but shall fix such maximum sentence as the court shall deem appropriate, . . ."

STATEMENT OF THE CASE.

Petitioner was tried before the Honorable W. Richard Eshelman and a jury on the charges of Solicitation to Commit Sodomy, Prostitution and Assignation on March 17, 1970 as of No. 1391 of 1969, Berks County, Pennsylvania.

Petitioner was accused by an undercover State Trooper, Francis T. Golden, who also testified at her trial that she approached him at the Terminal Hotel bar in Reading by asking him, "Do you want to go out?" This was allegedly followed by further conversation during which Petitioner invited the trooper to her apartment; asked him if he could spend twenty ($20) dollars, and when he asked "What for?", Petitioner allegedly replied, "For a half and half." When urged by the trooper to explain this statement, Petitioner allegedly did so, but this was the end of the conversation.

On the basis of this conversation alone, Petitioner was charged with Solicitation to Commit Sodomy, Prostitution and Assignation, despite the fact that Petitioner, who did not take the stand, had two impartial witnesses who testified quite clearly that they overheard the alleged conversation and that Trooper Golden not only went over to Petitioner but also opened the conversation by asking her if he could take her out, whereupon she immediately got up and left, saying nothing to him. The second witness also testified that Petitioner had been working for some time as a nurse at Berks-Heim, a County home, and was not a professional prostitute.

Petitioner demurred to the evidence on all three charges. The Trial Judge overruled the demurrer as to Solicitation to Commit Sodomy and Prostitution, but sustained the demurrer as to Assignation (n.t. pp. 20-21).

The jury, after deliberating four (4) hours, returned a verdict of guilty on both of the remaining charges.

On March 1, 1971, Motions for New Trial and In Arrest of Judgment were argued, but they were denied.

On November 9, 1972, Petitioner was sentenced by Judge Eshelman to a four year maximum term of imprisonment in the State Industrial Home for Women at Muncy, plus a five hundred ($500) dollar fine and costs, under the New Muncy Act.

On April 22, 1975 the Superior Court of Pennsylvania affirmed the lower court per curiam with two judges not participating on the sole basis that the questions presented had not been raised during the trial of the case and were therefore waived.

On June 20, 1975, the Supreme Court of Pennsylvania affirmed the Superior Court of Pennsylvania per curiam. This petition follows.

REASONS FOR GRANTING THE WRIT.

I. The colloquy between the undercover Pennsylvania State Trooper and Petitioner set forth under Statement of the Case was completely denied at the trial by two impartial witnesses for the defense who testified that it was the trooper who approached Petitioner and asked her to go out with him, whereupon she immediately left the bar where this took place, saying nothing to the trooper. Taking the Commonwealth's version as true it is submitted that these mere words are not sufficient to amount to a solicitation to commit sodomy under the Act of June 24, 1939, P. L. 872, Sec. 502, 18 P. S. Sec. 4502, which provides that "Whoever, unlawfully and maliciously, assaults another with intent to commit sodomy, solicits and incites another to permit and suffer such person to commit sodomy with him or her, is guilty of a felony . . ."

It is submitted that fundamental error occurred when Petitioner was convicted under this Act solely by mere words of suggestion or proposition to commit sodomy allegedly spoken by Petitioner to State Police Trooper Golden. This issue was raised in the lower court in Defendant's brief in support of Motions for New Trial and In Arrest of Judgment. Under the third point of this brief in the Argument that the Verdict was Against the Charge of the Court, present counsel, who represented Petitioner at the time of trial,[1] argued that the Trial Judge, when asked by the jury for further instructions on the definition of prostitution, instead of merely reading this from the Penal Code, re-read the portion of his charge which referred to Trooper Golden's testimony, thereby emphasizing it as the factual one without commenting on the contrary testimony of Petitioner's witnesses. This error was compounded by the further comment of the Trial Judge, as follows: "if you do not find from the evidence that the defendant offered or proposed to Trooper Golden to have sexual intercourse with him, and named a price to be paid to her, then you should find the defendant not guilty of the count of prostitution."

1. Charles F. G. Smith, Esquire, 419 Devon State Road, Devon, Pennsylvania 19333 (Tel. 215-687-1692) who is not presently admitted to Your Honorable Court, however, he trusts that his appointment can be moved if Petitioner is granted a hearing. For this reason Petitioner has signed her brief pro se, even though it has been prepared by present counsel.

One of the main points in present counsel's brief on direct appeal to the Superior Court of Pennsylvania, and one of the main thrusts of his argument before that Court, was not only the same point raised during the argument on the Post-Trial Motions, but a separate point was also argued which was identical to the point now being raised before Your Honorable Court.

Although this point was not specifically referred to in the Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, present counsel did refer to the companion case of *Commonwealth v. Joan Piper*, 221 Pa. Superior Ct. 187, 289 A. 2d 193 (1972) which embodied this point and which was then awaiting decision by the Supreme Court of Pennsylvania. As a matter of fact, counsel was informed during his argument before the Superior Court on Petitioner's case that their decision would be deferred pending the decision on the companion case of *Commonwealth v. Piper, supra.*

The attention of Your Honorable Court is called to the dissenting opinion in the case of *Commonwealth v. Piper* filed by the Honorable J. Sydney Hoffman in which he was joined by the Honorable Theodore O. Spaulding, which thoroughly covered this question. Petitioner cannot improve on the argument of Judge Hoffman, but, in addition, would like to refer Your Honorable Court to the

decision in *United States v. Binns*, D. C. Superior Ct., 11 Crim. 1. 2335, wherein it was indicated that almost identical language to that allegedly uttered by Petitioner is protected by the First Amendment to the Constitution of the United States under the Freedom of Speech provisions.

The case of *Commonwealth v. Piper* was tried by the same Trial Judge, the now President Judge W. Richard Eshelman, involving the same charges by the same undercover State Trooper and in which Joan Piper was represented by present counsel in this case.

Mr. Justice Hoffman in his Opinion criticized this charge as a misreading of 18 P. S. Sec. 4502, quoted *supra*. Mr. Justice Hoffman distinguishes between assaults with intent to commit sodomy and mere solicitation to commit sodomy. He also distinguishes between the Act of 1939, as aforesaid, and the Act on which it was based, the Act of July 16, 1917, P. L. 1000, Sec. 3 (formerly 18 P. S. Sec. 833).

As is pointed out in this Opinion, the operative distinction between the Act of 1917 and the Act of 1939 is that the Act of 1917 makes it a crime simply to "endeavor to persuade another . . . to commit sodomy . . . ," whereas the Act of 1939 requires that the person soliciting, must "incite" and "suffer" the one influenced to commit sodomy. The case of *Smith v. Commonwealth*, 54 Pa. 209 (1867) points out that prosecutions for solicitation should be limited because of the vast possibilities of abuse where there is no overt act to substantiate the solicitation. *Commonwealth v. Merrick et al.*, 65 Pa. Super. 482, 489 (1917) requires that the person influenced be "incited."

This clearly did not happen in either of these cases. Furthermore, this is a penal statute and, as such, must be strictly construed.

On the basis of the above, Petitioner contends that she committed no "assault", which the Act calls for, and, therefore, she is not punishable under the Act of June 24, 1939 P. L. 872, Sec. 502, 18 P. S. Sec. 4502, and she should, therefore, be discharged and her conviction set aside on the charge of solicitation to commit sodomy.

II. If the count of solicitation to commit sodomy is vacated Petitioner's sentence cannot stand. See dissenting opinion of Judge Hoffman in the case of *Commonwealth v. Piper, supra,* since the maximum sentence for prostitution alone is one year under the Act of June 24, 1939, P. L. 872, Sec. 502, 18 P. S. Sec. 4502. Since the maximum sentence is not more than one year, Petitioner cannot be committed to Muncy, under the express provisions of the New Muncy Act, the Act of July 16, 1968 P. L. 349, 171, Sec. 1 61 P. S. Sec. 566, which was in effect at the time of sentencing of Petitioner on November 9, 1972. The new amendment eliminating the one-year minimum requirement before women could be sentenced to Muncy went into effect six months after December 30, 1974, P. L. —, No. 345, Sec. 2(a).

Even if the solicitation to commit sodomy conviction was valid, the sentence imposed upon Petitioner of four (4) years imprisonment with no minimum sentence imposed is illegal, for the reasons set forth in Judge Hoffman's dissenting Opinion, joined by Judge Spaulding in the Superior Court of Pennsylvania, in the companion case of *Piper supra,* and the dissenting opinion of Judge Pomeroy, in which Chief Justice Benjamin Jones joined in the Supreme Court of Pennsylvania.

Despite the fact that majority opinions in both these Courts denied the appeal of *Joan Piper* which were endorsed by the per curiam decisions in Petitioner's case by these Courts, on the basis of waiver which will be dis-

cussed in the next point, it appears to Petitioner that, had these Courts considered this question on the merits, they would have decided in favor of Petitioner.

The basis of the dissenting opinions cited is that the New Muncy Act failed to give equal protection of the laws to women offenders in violation of the Fourteenth Amendment to the Constitution of the United States leading to the partial declaring of the New Muncy Act as unconstitutional, more particularly the provision mandating that no woman receive a minimum sentence. *Commonwealth v. Butler,* – Pa. –, 328 A. 2d 851, 858 (1974); *Commonwealth v. Saunders,* – Pa. –, 331 A. 2d 193 Supp. 1975. This decision was arrived at by comparing the Act of July 16, 1968, P. L. 349, No. 171, Sec. 1, 61 P. S. Sec. 566 with 19 P. S. Sec. 1057 which applied to men.

As pointed out in *Commonwealth v. Stauffer,* 214 Pa. Super. 113, 251 A. 2d 718 (1969) the denial of equal protection in the two statutes above quoted could be illustrated by offenses punishable by simple imprisonment in which men were incarcerated in a county prison, whereas women were sent to a maximum security prison, the State Correctional Institution at Muncy.

Furthermore, as was pointed out in *Commonwealth v. Daniels,* 430 Pa. 642, 234 A. 2d 400 (1968), a judge had no discretion, even though he had a strong inclination, as Judge Eshelman did in *Commonwealth v. Piper, supra,* see also 63 Berks Cty L. J. p. 117, 120, to recommend a minimum of six (6) months. In the case of *Commonwealth v. Fullwood,* 214 Pa. Super. 135, 251 A. 2d 677 (1969) the court went so far as to remand a female defendant charged with embezzlement by public officer and fraudulent conversion because she was not properly sentenced to an indefinite term. The Act of July 16, 1968, P. L. 349, No. 171, Sec. 1, 61 P. S. Sec. 566, Supp. 1974.

For the above reasons, Petitioner was denied equal protection of the law under the Fourteenth Amendment to the Constitution of the United States when a maximum sentence of four (4) years was imposed, which is not only illegal, but extremely discriminatory, as none of the defendants in at least ten companion cases tried by present counsel received more than a two-year maximum sentence, and none of them to counsel's knowledge served over six (6) months. The minimum remedy which Petitioner seeks from Your Honorable Court is that her case be remanded with a recommendation that her sentence be reconsidered. It is urged, however, that justice could best be served by discharging Petitioner if Your Honorable Court agrees that her fundamental Constitutional rights have been violated.

III. Since the companion case of *Commonwealth v. Piper, supra,* preceded the instant case on appeal by several months because sentencing was deferred in the instant case by several post-trial petitions for continuance, largely for medical reasons, the majority opinion of the Superior Court in the *Piper* case and the dissenting opinion of Judges Hoffman and Spaulding which led to the partial setting aside of the New Muncy Act, were handed down after the trial of the instant case, but before Petitioner filed her appeal on February 16, 1973. For this reason Petitioner could not have raised the question of the error in her sentencing on November 9, 1972 on the basis of Judge Hoffman's dissenting opinion filed on March 24, 1972, until her brief was filed and her appeal was argued before the Superior Court of Pennsylvania on March 23, 1973. For this reason the waiver rule is not applicable here because it would have been premature for the Petitioner to raise this question at the time of trial, post-trial motions, or at the time of sentencing. Plaintiff properly presented this question before the proper tribunal on appeal and did not

waive it previous to this first opportunity to have the question reviewed. Secondly, the waiver rule has never been invoked with respect to errors in sentencing as Judge Pomeroy points out in his dissenting opinion when the *Piper* case was decided by the Supreme Court of Pennsylvania on October 16, 1974.

For the above reasons the Appellate Courts of Pennsylvania improperly invoked the waiver rule and should have considered the first two questions presented herein on the merits.

CONCLUSION.

For the reasons set forth above and in the dissenting opinions of the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania in the companion case of *Commonwealth v. Piper, supra,* this Petition for a writ of certiorari should be granted.

Respectfully submitted,

AUDREY JEFFERSON,
Petitioner pro se.

Appendix.

IN THE
COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA
CRIMINAL DIVISION.

No. 1391 of 1969.
SUR MOTIONS FOR NEW TRIAL AND ARREST OF JUDGMENT.

COMMONWEALTH OF PENNSYLVANIA

v.

AUDREY JEFFERSON.

Argued before ESHELMAN and EDENHARTER, *JJ.*

MEMORANDUM OPINION.

ESHELMAN, *P. J.* February 6, 1973.

Defendant was found guilty by a jury on two counts—solicitation to commit sodomy and prostitution. The trial judge sustained a demurrer to the count of assignation. Defendant filed various reasons for new trial and arrest of judgment but presented argument in support of only three reasons, namely, that the verdicts were against the law, against the evidence and weight of the evidence, and against the charge of the court. Following argument the court dismissed defendant's motions. Defendant has appealed, and the within opinion is filed in support of the order of dismissal.

Defendant contends that the verdicts were against the law because the Commonwealth failed to produce the arresting officer and give defendant an opportunity to confront and cross-examine him, and failed to prove the arrest was legal. This contention is without merit. The testimony disclosed that the arresting officer was not the prosecuting officer and was not present at the time and place of the alleged offenses, and there is nothing to indicate that the arresting officer could provide any relevant testimony. The name of the arresting officer was not listed on the indictment and defendant did not request that he be produced or called as a witness. Further, the defendant having posted bail and having been indicted, arraigned and tried, she cannot now for the first time challenge the validity of the arrest. See Commonwealth v. Smith, 212 Pa. Superior Ct. 403 (1968).

Defendant also contends that the verdicts were against the law because defendant, a Negro, was compelled to stand trial by a jury selected from a panel consisting entirely of white persons in violation of her rights of equal protection and due process under the Fourteenth Amendment of the Constitution of the United States. Although it is a violation of due process to exclude jurors by reason of their race, the burden of proving the existence of a purposeful discrimination is on the party who asserts it: Commonwealth v. Darden, 441 Pa. 41 (1970). There is nothing in the record to support defendant's contention that all of the jurors empaneled for criminal trials during the week of March 16, 1970, were of the white race. Further, defendant did not raise this particular objection until additional reasons for new trial and arrest of judgment were filed on January 27, 1971. Under Pa. R. Crim. P. 1104 challenges to the array of trial jurors must be made not later than five days before the first day of the week the

case is listed for trial, and under Pa. R. Crim. P. 1106, challenges for cause must be exercised at the time of voir dire of prospective jurors. See Commonwealth v. Reeves, 218 Pa. Superior Ct. 88 (1970).

Defendant next contends that the verdicts were against the evidence and weight of the evidence in that the testimony of two defense witnesses was to the effect that the state police officer approached defendant and asked her to go out with him (N. T. 25, 40), as compared to the testimony of the officer that the defendant approached him and said and did certain things (N. T. 7). The credibility of the testimony and the weight to be afforded it was for the jury to determine, and the officer's testimony was sufficient to support the guilty verdicts. "The test of the sufficiency of the evidence is whether accepting as true all the evidence upon which, if believed, the jury could have properly based its verdict, such evidence is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime charged": Commonwealth v. Lawrence, 428 Pa. 188, 190 (1968).

Defendant finally contends that the verdict was against the charge of the court. Although defendant admits in her argument brief that the trial judge "charged the jury carefully on the testimony" of the two defense witnesses, defendant contends that the jury was prejudiced because the jury believed the officer but did not believe the defense witnesses. The matter of credibility and weight of the testimony was discussed above, and this tenuous argument of prejudice does not merit further comment. Defendant also contends that she sought to show she was not a professional prostitute by testimony of a defense witness that defendant was employed at the time of trial as a nurse (N. T. 43), and that the trial judge erred by refusing to mention this in his charge to the jury even though re-

quested to do so by defendant (N. T. 77, 78). This refusal was not error. The issue was not whether defendant was a professional prostitute but whether she committed prostitution on March 27, 1969. The same defense witness testified that he didn't know whether or not the defendant was employed in March 1969. What the defendant's employment was a year after the time of the alleged offenses was of no significance. Further, the trial judge told the jury in his charge that he had not attempted to review all of the testimony and that the jury should not conclude that only the testimony mentioned by him or by counsel was the important testimony, and that he was not trying to influence the jury's verdict by anything he said or didn't say (N. T. 74, 75). Defendant further contends that the trial judge abused his discretion when, upon receiving a request from the jury during its deliberations for a definition of prostitution, he gave the definition as stated in the Penal Code and explained its application to the case at hand (N. T. 79, 80) in a manner similar to that previously stated in the charge (N. T. 66). Although on each occasion the trial judge invited comment from counsel, defendant made no objection to either of these instructions (N. T. 76-78, 81) and cannot now raise it for purposes of argument. The court therefore concludes that the verdicts were not against the charge of the court.

Defendant offered no argument in support of the other reasons filed for new trial and arrest of judgment and they are therefore treated as abandoned.

By THE COURT:

(s) W. RICHARD ESHELMAN,
P. J.

IN THE
SUPERIOR COURT OF PENNSYLVANIA.

—

No. 218, OCTOBER TERM, 1973.

—

COMMONWEALTH OF PENNSYLVANIA

v.

AUDREY JEFFERSON,
Appellant.

—

APPEAL FROM JUDGMENT OF SENTENCE ON NOVEMBER 9, 1972 AS OF NO. 1391 OF 1969, COURT OF COMMON PLEAS, CRIMINAL DIVISION, BERKS COUNTY.

—

PER CURIAM: FILED: APRIL 22, 1975

On March 17, 1970, appellant was convicted by a jury of prostitution and solicitation to commit sodomy. Post-trial motions were argued on March 1. 1971, but were denied by the court below. On November 9, 1972, appellant was sentenced to a four year maximum term of imprisonment to the State Industrial Home for Women at Muncy.

Appellant offers two principal challenges to her judgment of sentence. First, appellant contends that her conduct did not fall within the language of the statutory definition of solicitation to commit sodomy. Act of June 24, 1939, P. L. 872, § 502, 18 P. S. § 4502.[1] As this con-

1. This section of the Act of 1939 was repealed, and is now covered by §§ 902, 905(a), 3123, and 3124 of the new Crimes Code.

tention was not raised in the court below, appellant cannot raise it for the first time on appeal. *Commonwealth v. Clair*, – Pa. –, 326 A. 2d 272 (1974); *Commonwealth v. Agie*, 449 Pa. 187, 296 A. 2d 741 (1972). Second, appellant argues that the act under which she was sentenced [2] deprived her of the equal protection of the laws because it prohibits the sentencing court from imposing a minimum sentence on females while there is no such requirement for male offenders. The Pennsylvania Supreme Court has held that "the provision in the new Muncy Act mandating that no woman receive a minimum sentence must fall." *Commonwealth v. Butler*, – Pa. –, 328 A. 2d 851, 858 (1974). Yet in *Commonwealth v. Piper*, – Pa. –, 328 A. 2d 845 (1974), a case virtually identical to the present case, the Supreme Court refused to address the merits of appellant's contention because the issue was never raised in the trial court. Examination of the record in the instant case reveals that neither of the issues raised in this Court were included in appellant's post-trial motions nor brought to the attention of the court at time of sentencing. Consequently, we cannot, under *Piper*, reach the merits of appellant's arguments.

Judgment of sentence is affirmed.

WRIGHT, *P. J.*, and SPAULDING, *J.*, did not participate in the consideration or decision of this case.

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2. Appellant was sentenced under the Muncy Act, Act of July 16, 1968, P. L. 349, § 1, 61 P. S. § 566, which provided in pertinent part: "Any court of record in this Commonwealth, exercising criminal jurisdiction, may, in its discretion, sentence to the State Industrial Home for Women any female over sixteen years of age, upon conviction for, or upon pleading guilty of, the commission of any criminal offense. . . . The court in imposing sentence shall not fix a minimum sentence, but shall fix such maximum sentence as the court shall deem appropriate, . . ."

ORDER OF SUPREME COURT OF PENNSYLVANIA ON BOTH THE PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR COURT, AND THE PETITION FOR SUPERSEDEAS.

June 20, 1975

Denied

Per Curiam

IN THE
SUPERIOR COURT OF PENNSYLVANIA.

—

No. 630, OCTOBER TERM, 1971.

—

COMMONWEALTH OF PENNSYLVANIA

v.

JOAN PIPER,

Appellant.

—

APPEAL FROM THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL, OF BERKS COUNTY AT NO. 1382 OF 1969.

—

PER CURIAM Filed: March 24, 1972

Judgment of sentence affirmed, and the defendant is directed to appear in the court below at such time as she may be there called, and that she be by that court committed until she has complied with the sentence, or any part thereof which has not been performed at the time the appeal was made a supersedeas.

HOFFMAN, *J.* files a dissenting opinion. SPAULDING, *J.* joins in part three of the dissenting opinion, and would affirm in all other respects.

DISSENTING OPINION.

HOFFMAN, *J.* Filed: March 24, 1972

In this direct appeal, appellant attacks her convictions for solicitation to commit sodomy, prostitution and assignation.

The facts in this case, as established at appellant's jury trial, are that appellant approached an undercover state police trooper and solicited him to commit sodomy and prostitution. Based on this conversation, a warrant was issued and served for the arrest of appellant charging her with the crimes for which she was found guilty. The lower court sentenced her to 15 months imprisonment, undifferentiated as to the charges, at the State Industrial Home for Women (Muncy) pursuant to the Act of July 16, 1968, P. L. —, No. 171, § 1, 61 P. S. § 566 (The New Muncy Act).

I.

The prosecution of appellant for solicitation to commit sodomy was brought purportedly under the Act of June 24, 1939, P. L. 872, § 502, 18 P. S. § 4502. This act provides that "[w]hoever, unlawfully and maliciously, assaults another with intent to commit sodomy, or solicits, and incites another to permit and suffer such person to commit sodomy with him or her, is guilty of a felony . . ."

The lower court interpreted this language to mean that mere solicitation to commit sodomy, without more, is sufficient to constitute a violation of the act. Accordingly, the court charged the jury that "if you find from the evidence that the defendant spoke words of suggestion or proposition or urging, to Trooper Goldern, to commit sodomy with her, with the intention on the part of the defendant to pursue the matter further, by committing the

unlawful act of sodomy, if Trooper Golden was willing to participate, then you should find the defendant guilty of count 1, solicitation to commit sodomy."

This charge, in my view, is based upon a misreading of 18 P. S. § 4502. That statute on its face only punishes assaults with intent to commit sodomy and actual consensual sodomy. On at least two other occasions, however, lower courts have held that 18 P. S. § 4502 punishes the mere solicitation to commit sodomy. *Commonwealth v. Krout*, 17 D. & C. 2d 795 (1958); and *Commonwealth v. Schaller*, 72 D. & C. 459 (1950).

In *Schaller* (*Krout* relies exclusively on *Schaller.*) the Court held that 18 P. S. § 4502 was predicated on the prior Act of July 16, 1917, P. L. 1000, § 3 (formerly 18 P. S. § 833), and that both the present act and the act of 1917 punished mere solicitations to commit sodomy. There are no relevant appellate court cases with respect to § 4502 or the Act of 1917.

The Act of 1917 provides in Section 3 thereof that "[i]f any person shall unlawfully and maliciously assault another, with intent to commit sodomy as in this act defined, *or* if any person shall wickedly and unlawfully solicit and incite and endeavor to persuade another to permit and suffer such person to commit sodomy, as in this act defined with him or her, such person shall be guilty of a misdemeanor . . . ." (Emphasis added).

Distinctions between the Act of 1917 and the present act are apparent.

First, the Act of 1917 provides in the disjunctive that assaults with intent to commit sodomy "or if any person shall . . . solicit and incite and endeavor to persuade another to permit and suffer such person to commit sodomy" are both punishable offenses. With respect to the present act, however, a crime is committed if one solicits,

and incites another to permit and suffer such person to commit sodomy with him or her. The operative distinction is that the Act of 1917 makes it a crime simply to "*endeavor to persuade* another to permit and suffer such person to commit sodomy . . . with him or her." The present act does not punish persons who endeavor to persuade others to commit sodomy with them, but only persons who "incite another to permit and suffer such person to commit sodomy with him or her." Thus, the present act comports with the philosophy set forth in *Smith v. Commonwealth*, 54 Pa. 209 (1867), that prosecutions for solicitation should be limited because of the vast possibilities of abuse where there is no overt act to substantiate the solicitation.

Second, if the present act was read to punish mere solicitations to commit sodomy, the words "incite" and "and suffer" would be surplusage. Such words, however, have a meaning distinct from that of "solicit." While solicit means to offer, "incite" has as "its plain and accepted meaning—to arouse, stir up, urge, provoke, encourage, spur on, goad, . . ." *Commonwealth v. Merrick et al.*, 65 Pa. Superior Ct. 482, 489 (1917). Thus, to "incite", one must have an effect upon the person one is trying to influence. This clearly did not happen in the instant case. Here, the person solicited by appellant was an undercover vice squad state trooper whose specific assignment was to be solicited by prostitutes. There was absolutely no evidence that he was incited by the solicitation by appellant, and in fact the opposite would seem to be true insofar as he was responsible for her arrest.

The present act's requirement that the person addressed must "suffer [the person making the solicitation] to commit sodomy with him or her" likewise has a distinct meaning from the conjunctive requirement that the person who suffers the sodomy must also permit it. The word

"permit" means merely to allow. The word "suffer", however, indicates that there is some requirement that the person addressed must also undergo some physical contact with or without permission. Thus, in *Dunseath et ux. v. Traction Co.*, 161 Pa. 124, 130 (1894), and in *Long et ux. v. The Philadelphia and Reading Railroad Company*, 75 Pa. 257, 265 (1874), the word "suffer" was understood as implying that an actual act was done, albeit with permission. In *Shaffer v. Greer*, 87 Pa. 370, 375 (1878), it was held that the "word 'suffered' necessarily implies that it is not confined to the voluntary acts of the grantor. . . ."

Accordingly, the words "incite" and "suffer" have accepted jurisprudential meaning which militate against the present act as being read to punish mere solicitations.

Of course, the presence of "incite" and "suffer" in the present act can be ignored or rationalized as was the case in the lower court's opinion in *Schaller*, but to do so violates the fundamental principles set forth in the Statutory Construction Act,[1] that "[w]ords and phrases shall be construed [in statutes] according to their common and approved usage . . ." and that "[e]very law shall be construed, if possible, to give effect to all its provisions. When the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursing its spirit." 46 P. S. § 551.

Further, we are here dealing with the penal statute which we must strictly construe. Doubts concerning the scope of the statute should be resolved in favor of a defendant. 46 P. S. § 558. As was stated in *Commonwealth v. Hosendorf*, 437 Pa. 219, 263 A. 2d 439 (1970), which in turn quoted from Justice FRANKFURTER's statement for the Supreme Court in *Bell v. United States*, 349

1. The Act of May 28, 1937, P. L. 1019, art. III, § 33, 46 P. S. 533.

U. S. 81, 83 (1955), "it is 'a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.'" This principle rests upon "'the instinctive distaste against men languishing in prison unless the law maker has clearly said they should.'" 437 Pa. at 223, A. 2d at .

Therefore, I would hold that the solicitation in the instant case is not punishable pursuant to 18 P. S. 4502, and that the appellant should have been discharged on the count of solicitation to commit sodomy.

II.

If the appellant's conviction to commit sodomy is vacated, the sentence imposed cannot stand. The crimes of prostitution and assignation herein merge, and the appellant may only be sentenced for their commission to a maximum of one year imprisonment. The Act of June 24, 1939, P. L. 872, § 512, 18 P. S. 4512. Since the maximum sentence is therefore not more than one year, appellant cannot be committed to Muncy pursuant to the express provisions of the New Muncy Act, *supra*.

III.

Even if solicitation to commit sodomy conviction was valid, the sentence imposed upon the appellant of a fifteen month term of imprisonment, with no minimum sentence imposed, is illegal. The provision in the New Muncy Act providing only for the setting of a maximum sentence but no minimum sentence is unconstitutional as it constitutes a denial of equal protection to women so sentenced.

Specifically, the Act of June 19, 1911, P. L. 1055, § 6, as amended, 19 P. S. 1057, provides that any person convicted of a crime punishable by imprisonment in a

State penitentiary shall be sentenced to both a maximum and a minimum term, the minimum never to exceed one-half of the maximum sentence. While the minimum sentence imposed has no compelling significance, it has been construed to be an administrative notice by the court to the Parole Department calling attention to the legislative policy that when a prisoner's minimum sentence is about to expire, the Parole Department should consider the question of whether the prisoner ought to be paroled. *Commonwealth ex rel. Atkins v. Pennsylvania Board of Parole,* 63 Dauph. 239 (1953); *Commonwealth ex rel. Gray v. Pennsylvania Board of Parole,* 62 Dauph. 456 (1953); *Commonwealth v. Kalck,* 239 Pa. 533, 541, 87 A. 61 (1913).

Although the Board of Parole may refuse to grant a prisoner a parole at the end of his minimum sentence, the minimum sentence has tremendous practical significance as it is equivalent to an order to the Board of Parole that review of a prisoner's status should be started as of a certain time.

In the absence of a stated minimum sentence, however, consideration of whether a prisoner should be paroled may begin the day he is incarcerated. On the other hand, review of his parole status may not begin until a substantial time period has elapsed after the time when the prisoner would have finished serving his minimum sentence, had the Court imposed such a sentence.[2]

2. Such was the case after the passage of the New Muncy Act. At that time Muncy authorities devised a mechanical formulation that a woman serving a two year maximum sentence at Muncy must wait eight months before being considered for parole by the State Board of Parole. A year's waiting period was required for those women sentence to a longer maximum term. A man sentenced to a maximum of two years with a minimum term of four months is considered as eligible for parole at the expiration of four months, while a woman convicted of the same crime and sentenced under the New Muncy Act to the same maximum of two

Accordingly, the Board of Parole is given unfettered discretion in determining whether and when to consider whether a person sentenced to either a fixed maximum term of imprisonment or an indeterminate sentence is to be paroled.

The question before this Court then is whether it is constitutionally permissable for the legislature to provide that women sentence to Muncy should not have a minimum sentence, but that men sentenced on the same types of crimes shall have a minimum sentence imposed, insofar as the minimum sentence has tremendous significance with respect to the placing of the convicted person on parole.

In the instant case it should be noted that both men and women can be convicted and sentenced under the sodomy and prostitution statutes upon which the lower court relied.

No rational basis for distinguishing between the parole treatment accorded men and women is apparent. While it is true as stated in *Commonwealth v. Daniel,* 430 Pa. 642, 649-650, 243 A. 2d 400 (1968), that "a classification by sex alone would not, *per se,* offend the Equal Protection Clause of the United States Constitution," it is also true that "considerations and factors which would justify a difference between men and women in matters of employment, as well as in a number of other matters, *do not govern* or justify the imposition of a longer or greater sentence of women than is imposed upon men for the commission of the same crime. In particular, we fail

2. (Cont'd.)
years was not considered for parole until eight months from the date of her sentence, a full four months longer than her male counterpart. See the study of parole procedures contained in *Constitutionality of the 1968 Muncy Act,* an unpublished paper by Maxine Stotland, Esq., a copy of which paper I have filed with the Prothonotary of the Superior Court.

to discern any reasonable and justifiable difference or deterrents between men and women which would justify a man being *eligible* for a shorter maximum prison sentence than a woman for the commission of the same crime, especially if there is no material difference in their records and the relevant circumstances."

Since the net effect of sentencing women only to a stated maximum and men to a stated maximum and minimum is to discriminate as between them in terms of consideration of their parole, the language in *Daniel* is directly applicable to the New Muncy Act. See also *Reed v. Reed*, – U. S. –, 92 S. Ct. 251 (1971). Indeed, the Court in *Daniel* recognized as much when in commenting on the predecessor Muncy Act, therein declared unconstitutional, it was noted that "[t]he privilege of a minimum sentence given to men under the Act of 1911 may ultimately govern their release from prison." 430 Pa. at 647.

I conclude, therefore, that the act on its face is unconstitutional and appellant should not have been sentenced in accordance therewith.

SPAULDING, *J.*, joins in Part III of this dissenting opinion and would affirm in all other respects.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

—

No. 27, JANUARY TERM, 1973.

—

COMMONWEALTH OF PENNSYLVANIA

v.

JOAN PIPER,
Appellant.

—

APPEAL FROM ORDER OF SUPERIOR COURT, No. 630, OCTOBER TERM 1971, AFFIRMING JUDGMENT OF SENTENCE OF COURT OF COMMON PLEAS, BERKS COUNTY, CRIMINAL DIVISION, AT No. 1382 OF 1969.

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OPINION OF THE COURT.

ROBERTS, *J.* Filed: OCTOBER 16, 1974

Joan Piper was tried by a jury and convicted of prostitution and solicitation to commit sodomy. A sentence of fifteen months imprisonment and a $500 fine was imposed. The Superior Court in a per curiam opinionless order affirmed. *Commonwealth v. Piper*, 221 Pa. Superior Ct. 187, 289 A. 2d 193 (1972), affg 63 Berks County L. J. 117 (Pa. C. P. 1971). We granted the petition for allowance of appeal,[1] and now affirm.

1. Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P. L. 673, art. II, § 204(a), 17 P. S. § 211.204(a) (Supp. 1974).

Appellant first asserts as error the trial court's refusal to charge on identification, on entrapment, and that the facts proved by the Commonwealth could not support a verdict for both prostitution and for solicitation to commit sodomy. However, no points for charge were submitted to the trial court by defense counsel. And at the conclusion of the charge and before the jury retired, the trial court queried whether "counsel have any motion, request or exception with respect to the charge?" Defense counsel answered negatively. See 63 Berks County L. J. at 120. In these circumstances, appellant's failure to take a specific exception to the charge forecloses our consideration of these issues on appeal. *Commonwealth v. Watlington*, 452 Pa. 524, 305 A. 2d 892 (1973); Pa. R. Crim. P. 1119(b). See also *Commonwealth v. Martinolich*, — Pa. —, — n. 10, 318 A. 2d 680, 688 n. 10 (1974); *Commonwealth v. Yount*, 455 Pa. 303, 318-19, 314 A. 2d 242, 250 (1974); *Commonwealth v. Jennings*, 442 Pa. 18, 24, 274 A. 2d 767, 770 (1971).

Two further challenges to appellant's judgment of sentence are proferred. First, it is maintained that appellant's conduct did not fall within the language of the statutory definition of solicitation to commit sodomy. Act of June 24, 1939, P. L. 872, § 502.[2] Second, appellant argues that the failure to set a minimum limit on her sentence denied her the equal protection of the laws since a male offender would have received a minimum sentence.[3] Appellant, however, admits that neither issue was raised in the trial court[4] or in the Superior Court;[5] they are raised

2. Section 502 of the Act of June 24, 1939, P. L. 872 has been repealed. Solicitation to commit sodomy is now dealt with by 18 Pa. S. §§ 902, 905(a), 3123, 3124 (1973).

3. Compare Act of June 19, 1911, P. L. 1055, § 6, as amended, 19 P. S. § 1057 (Supp. 1974), with Act of July 16, 1968, P. L. 349, § 1, 61 P. S. § 566 (Supp. 1974).

In *Commonwealth v. Butler*, — Pa. —, — A. 2d — (1974), this Court declared unconstitutional that portion of 61 P. S. § 566 that proscribed the imposition of a minimum limit on sentences for women convicted of crime and sentenced to imprisonment at the State Correctional Institution at Muncy.

4. The constitutional attack on the new Muncy Act, Act of July 16, 1968, P. L. 349, § 1, 61 P. S. § 566 (Supp. 1974), was also not brought to the trial court's attention at sentencing. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures § 5.3(e), (f) (Approved Draft, 1968).

5. The dissenting opinion misperceives our refusal to consider appellant's equal protection challenge. Even if a claim is properly presented to the trial court or the sentencing court, if it is abandoned in the Superior Court, then this Court will not pass on it. *Chartiers Creek Bridge*, 235 Pa. 365, 84 A. 351 (1912) (per curiam). Failure to pursue an issue on appeal is just as effective a forfeiture as is the failure to initially raise the issue. That we allowed an appeal on the assumption that an issue was properly before us makes no difference. This Court long ago affirmed this salutary rule.

> "It was alleged in the petition for the allowance of an appeal that the case involved [a constitutional issue]. . . . And in the order allowing the appeal it was stated that the appeal was allowed for the reason that a constitutional question was involved . . .
>
> "It appears from the record that the [constitutional] question was not raised in the Superior Court at any stage of the proceedings by the appellant . . .
>
> "Where an order allowing an appeal from the Superior Court states that the appeal is allowed because a constitutional question is involved, the argument here will be limited to that question. Where an assignment of error has been abandoned or not pressed at the argument in the Superior Court, it will not be considered here."

Chartiers Creek Bridge, 235 Pa. at 366, 84 A. at —. Accord, *Commonwealth v. Caruffiel*, 298 Pa. 320, 321, — A. —, — (1929) (per curiam); *Clarion Borough Petition*, 275 Pa. 175, 118 A. 765 (1922) (per curiam). See also *Wynnewood Civic Ass'n v. Lower Merion Township Bd. of Adjustment*, 406 Pa. 413, 419, 179 A. 2d 649, — (1962).

And this Court has recently and emphatically reaffirmed the rule that we will consider only those claims properly raised by counsel. *Commonwealth v. Clair*, — Pa. —, — A. 2d — (1974); *Dilliplaine v. Lehigh Valley Trust Co.*, — Pa. —, 322 A. 2d 114 (1974); *Commonwealth v. Agie*, 449 Pa. 187, 189, 306 A. 2d 892, 893 (1973).

for the first time in this Court. "We have consistently held that issues not raised in the court below are waived and cannot be raised for the first time on appeal to this Court." *Commonwealth v. Agie*, 449 Pa. 187, 189, 296 A. 2d 741, 741 (1972). See also *Commonwealth v. Henderson*, 441 Pa. 255, 260, 272 A. 2d 182, 185 (1971). Therefore, this Court will not address the merits of these challenges. See *Commonwealth v. McFarland*, 452 Pa. 435, 437, 308 A. 2d 592, 593 (1973).[6]

Appellant's final contention is that her sentence is excessive. Imposition of sentence is within the sound discretion of the trial court. *Commonwealth v. Hill*, 453 Pa. 349, 310 A. 2d 88 (1973); *Commonwealth v. Person*, 450 Pa. 1, 4-5, 297 A. 2d 460, 462 (1972); ABA Project on Minimum Standards for Criminal Justice, Standard Relating to Sentencing Alternatives and Procedures §§ 2.2, 3.1 (Approved Draft, 1968). See generally Palmer, A Model of Criminal Disposition, 62 Geo. L. J. 1 (1973). Fifteen months imprisonment is within the limits set by the Legislature for the two crimes of which appellant was convicted.[7] And we cannot say that the sentence imposed was so excessive "as to be constitutionally impermissible." *Commonwealth v. Wrona*, 442 Pa. 201, 206, 275 A. 2d 78, 80-81 (1971); see *Commonwealth v. Lee*, 450 Pa. 152, 156-57, 299 A. 2d 640, 642-43 (1973).

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6. Similarly, the Supreme Court of the United States "has consistently refused to decide federal constitutional issues raised [there] for the first time on review of state court decisions. . . ." *Cardinale v. Louisiana*, 394 U. S. 437, 438, 89 S. Ct. 1161, 1163 (1969); see *Tacon v. Arizona*, 410 U. S. 351, 93 S. Ct. 998 (1973); *Hill v. California*, 401 U. S. 797, 805-06, 91 S. Ct. 1106, 1111 (1971).

7. See the Penal Code, Act of June 24, 1939, P. L. 372, § 512 (prostitution) (maximum $500 fine, or 1 year imprisonment, or both); id. § 502 (solicitation to commit sodomy) (maximum: $1000 fine, or 5 years imprisonment, or both).

Judgment of sentence affirmed.

MR. CHIEF JUSTICE JONES concurs in the result.

MR. JUSTICE EAGEN would remand for resentencing.

MR. JUSTICE POMEROY filed a dissenting opinion.

DISSENTING OPINION.

POMEROY, J. Filed: October 16, 1974.

Appellant contends that the failure of the court below to set a minimum limit on her sentence of imprisonment violated her constitutional rights. The majority declines to consider the merits of this contention on the ground that appellant has waived the issue by failing to raise it during the proceedings below. I cannot agree, and respectfully register my dissent.

It is of course true that alleged trial errors which are not brought to the attention of the trial court in a timely fashion will not be considered on appeal. Any such error must, at the very latest, be raised in post-trial motions. *Commonwealth v. Reid*, Pa. , A. 2d (1974) [J. 256]; *Commonwealth v. Agie*, 449 Pa. 187, 296 A. 2d 741 (1972). I am not aware, however, of any similar waiver rule with respect to errors in sentencing. No mention of such a rule appears in any of our recent decisions considering sentencing errors. *See, e.g., Commonwealth v. Brown*, 455 Pa. 274, 314 A. 2d 506 (1974); *Commonwealth v. Williams*, Pa. , 317 A. 2d 250 (1974); *Commonwealth v. Person*, 450 Pa. 1, 297 A. 2d 460 (1972); *Commonwealth v. Silverman*, 442 Pa. 211, 275 A. 2d 308; *Wilson Appeal*, 438 Pa. 425, 264 A. 2d 614 (1970). Indeed, this appears to be the first occasion on which we have applied the waiver rule to

a case of this sort. Sentencing, of course, takes place after the consideration of post-trial motions, the time when a defendant is required to specify the trial errors he expects to be considered by a court en banc and by an appellate court if an appeal is taken. *Compare* Pennsylvania Rules of Criminal Procedure 1123 *and* 1405; *see also* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, § 3.1(a) (Approved Draft 1968). I am not persuaded that the rule the Court announces today will operate in the interests of justice. But even if such a strict rule of waiver should govern our ordinary practice, the rule would not be applicable here.

Today, as the majority notes, this Court announces its decision in *Commonwealth v. Butler*, — Pa. —, — A. 2d — (1974) [J. 137], striking down on constitutional grounds that portion of the Muncy Act [1] which proscribes the imposition of minimum prison sentences for female offenders. As I read it, this decision is dispositive not only of Butler's constitutional claim, but of this appellant's as well. Under the holding in *Butler*, Joan Piper is entitled to have her cases remanded for resentencing, at which time a minimum sentence should be imposed.[2] In *Commonwealth v. Cheeks*, 429 Pa. 89, 239 A. 2d 793 (1968), this Court reached the merits of a constitutional claim based on *Pointer v. Texas*, 380 U. S. 400 (1965), although the issue had not been raised by the defendant at his trial, which occurred several months before the announcement of the *Pointer* decision. Speaking for the Court, Mr. Justice Roberts remarked: "It would be manifestly unfair to hold appellant to a waiver when this waiver is alleged to have

1. Act of July 16, 1968, P. L. 349, § 1, 61 P. S. § 566 (Supp. 1974).

2. *See* text, *infra*, at .

occurred at a time when neither the defendant nor his attorney had any way of knowing that there existed a right to be waived." *Id.* at 95, 239 A. 2d at 796. The Court has re-echoed this sentiment on several occasions.[3] Although I have not always agreed with the limits to which the Court has extended this exception to the waiver rule,[4] I am of the opinion that the exception should apply where, as here, the proceedings below are concluded before the announcement of a controlling appellate decision based on constitutional grounds and retroactively applied.[5]

Moreover, though no formal objection was raised at Joan Piper's sentencing hearing, there was considerable discussion concerning the term of sentence, and the trial court expressed chagrin at its inability to impose a mini-

3. *See Commonwealth v. Jefferson*, 423 Pa. 541, 226 A. 2d 765 (1967); *Commonwealth v. Richardson*, 433 Pa. 195, 249 A. 2d 307 (1969); *Commonwealth v. Simon*, 446 Pa. 215, 285 A. 2d 861 (1972); *Commonwealth v. Wayman*, 454 Pa. 79, 82, n. 1, 309 A. 2d 784, 786 (1973); *Commonwealth v. Hancock*, — Pa. —, 317 A. 2d 588, 590, n. 2 (1974).

It is difficult to see why the *Cheeks* exception to our normal and salutary waiver rule should be any less applicable to appellate proceedings (such as those in the Superior Court in the instant case) than it is to proceedings in a trial court. Indeed, it was so applied in *Commonwealth v. Hancock, supra*, where the appellant was allowed to raise a *non-constitutional* issue (*Commonwealth v. Futch*, 447 Pa. 389, 290 A. 2d 417 (1972)) which he had not raised in the Superior Court. The cases cited in footnote 5 of the majority opinion state the general rule, but in light of the more recent authority of the *Cheeks* line of cases, they seem to me to be inapplicable here.

4. *See, e.g.*, the dissenting opinion of this writer in *Commonwealth v. Wayman*, 454 Pa. 79, 86, 309 A. 2d 784, 788 (1973).

5. As indicated below, I have no doubt that our decision in *Butler* should, under the current guidelines governing the retrospective application of constitutional decisions, be applied retroactively. *See Desist v. United States*, 394 U. S. 244, 22 L. Ed. 2d 248 (1969); *Williams v. United States*, 401 U. S. 646, 28 L. Ed. 2d 388 (1971). But even were this not the case, I believe that *Butler* should at least be applied to this case and all other timely appeals not yet finally litigated.

mum sentence.[6] The validity of the sentence was considered in the dissenting opinion of Judge Hoffman in the Superior Court,[7] and we granted allocatur specifically to consider the question of the constitutionality of discriminating between male and female offenders in the imposition of minimum sentence. The case was fully argued in this Court, but we ordered reargument in conjunction with *Commonwealth v. Butler, supra.* In my view, logic and justice require that we consider appellant's constitutional claim.

Believing as I do that *Butler* is dispositive of appellant's constitutional claim, and that the Court's holding in that case should be given retroactive effect, I turn to the questions of the proper relief to be afforded appellant and the sentences to be imposed on other female offenders in Pennsylvania. Minimum sentences are of importance and concern to convicted offenders because of their bearing on the question of parole. The setting of a minimum sentence under the general sentencing statute (the Act of 1911),[8] considered in conjunction with our parole procedures, is in effect an order to the Parole Board to re-

6. The record contains the following comments by the court and counsel:

> The Court: "I think it only fair to state in this situation that it would probably be a guess, if they would leave us with a minimum, we wouldn't want a minimum of any more than six months at the most, but we can't say that anymore. It's up to someone else. All we can say is the maximum."
>
> Defense Counsel: "Can't the Court recommend?"
>
> The Court: ". . . It may seem to her we are saying 15 months is a persecution, our hands are tied on the minimum. As far as the sentence is concerned, they could release her tomorrow, which is the strange part about it."

7. 221 Pa. Superior Ct. 187, 289 A. 2d 193 (1972) (dissenting opinion of Hoffman, J., joined by Spaulding, J.).

8. Act of June 19, 1911, P. L. 1055, § 6, as amended by the Acts of June 29, 1923, P. L. 975, No. 397, § 1, and September 26, 1951, P. L. 1460, § 1, 19 P. S. § 1057.

view the prisoner's status at the time of the expiration of the minimum. Where there is no minimum sentence, *eligibility* for review commences on the date of incarceration, although as a practical matter, *actual* review may not occur until many months thereafter. As did Judge Hoffman in the Superior Court,[9] I take judicial notice of the fact that the Parole Board, in an exercise of its discretion, has created guidelines for determining when the case of a female offender imprisoned at Muncy will be taken up for consideration. In most instances, that action takes place more than six months from the date of incarceration. We thus have a statutory scheme which frequently inures to the benefit of those imprisoned under the Muncy Act, but sometimes, as here, is clearly prejudicial to female offenders. In the case at bar, immediately before pronouncing sentence, the court remarked that a minimum sentence of six months seemed appropriate to the case, but that the statute prohibited the setting of any minimum sentence.[10] Thus, had the sentence been imposed under the Act of 1911, appellant would have received review of her parole status at the end of six months, whereas under the sentence imposed under the Muncy Act, she can expect review only after expiration of a period almost certain to be longer.[11]

In light of these considerations, and after study of the helpful opinion of the Supereme Court of New Jersey in *State v. Chambers,* 63 N. J. 287, 307 A. 2d 78 (1973),

9. 221 Pa. Superior Ct. at 194, n. 2, 289 A. 2d at 197.

10. See note 6, *supra.*

11. Appellant was sentenced to fifteen months imprisonment on March 11, 1971. Under normal circumstances, her challenge to the sentencing statute would not be moot as a result of either expiration of the sentence of the granting of parole. At the time of sentencing, however, appellant was released on bail pending appeal. Consequently, appellant's constitutional claim remains justiciable.

I am of the opinion that the following steps should be taken.

One. Appellant Joan Piper should be sentenced to a minimum term in conjunction with her previously imposed maximum sentence. On remand, the sentencing court should be mindful of the minimum sentence which it indicated it would have imposed were it authorized to do so.

Two. Those women presently incarcerated at Muncy should be given the option of receiving minimum sentences. As noted above, the absence of a minimum sentence is often considered an advantage, and many inmates may elect not to be resentenced. The choice should be left to each individual.[12] The Commonwealth should be directed to give to all inmates of the State Industrial Home for Women at Muncy prompt written notice of this option in a form approved by the sentencing court, and any prisoner electing to be resentenced should apply for resentencing to the appropriate trial court within thirty days next following receipt of such notice.

Three. Finally, to insure equal treatment of the sexes, women offenders should hereafter be sentenced under the provisions of the Act of 1911 until otherwise provided by law.

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12. To *require* resentencing under the Act of 1911 would appear to be unconstitutional as an *ex post facto* law. *See Lindsey v. Washington*, 301 U. S. 397, 81 L. Ed. 1182 (1937). That is so because a minimum sentence where previously there was none can be a harsher penalty. While minimums could be imposed not to exceed the time already served, thereby insuring no prejudice to defendants, *Lindsey* indicates that an *ex post facto* law is determined by the *possibility* of an increased penalty, not by the sentence actually imposed. *Id.* at 301 U. S. 401. I perceive no policy, however, which would bar this Court from treating the request for a minimum sentence as a waiver of any *ex post facto* objection.

As I see it, this proposal is far preferable to piecemeal litigation of claims similar to the one at bar in proceedings under the Post Conviction Hearing Act. I see no reason to postpone the inevitable day when we will be obliged to confront these claims.

Mr. Chief Justice Jones joins in this dissenting opinion.